No. 133.

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JAMES H. McKENNEY,
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By. of Knaebel for Appellants (a

IN THE

SUPREME COURT

Filed May 27, 1901.

OF THE

UNITED STATES.

OCTOBER TERM, 1900.

No. 133.

JOEL PARKER WHITNEY AND FRANKLIN H. STORY,
Appellants,
vs.
THE UNITED STATES, ELOISA BERGERE, ET AL.,
Appellees.

Appeal from the Court of Private Land Claims.

APPELLANTS' MOTION FOR MODIFICATION OF DECREE, Etc.

JNO. H. KNAEBEL,
ERNEST KNAEBEL,
of Counsel for Appellants.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellants, J. Parker Whitney and Franklin H. Story, in view of the extraordinary jurisdiction of this court in causes appealed from the Court of Private Land Claims (*United States vs. Coe*, 155 U. S. 76), respectfully pray your Honors to modify the decree herein by an order remanding the cause for further proofs as to the condition of the Mexican archives at Santa Fé, and as to the actual possession and enjoyment of the Estancia grant by the grantee and his assigns, to the end that, upon such further proofs, when had, and the proceedings herein already had, the Court of Private Land Claims may consider and determine the question whether your petitioners shall then appear to be equitably entitled to a confirmation of the said grant, to the extent of eleven square leagues.

In aid of this petition, your petitioners file the subjoined affidavit of the appellant J. Parker Whitney, and they also urge upon your Honors the equities indicated by the following propositions, viz.:

1. In view of our sincere belief that Hon. Eduardo Ruiz was justified in his opinion that such grants as ours had legitimate origin in the supreme authority, conferred by the act of 1837, and manifested through the usual departmental agents, we did not feel it to be dutiful to our clients to contend for a confirmation of only eleven square leagues, under the law of 1824 and consequent customs and usages.

2. But, respectfully submissive to the ruling of the court, to the effect that, whatever granting powers the Supreme Executive possessed, by virtue of the act of April 4, 1837, or otherwise, the court has no jurisdiction to declare in this case, upon presumption, that Armijo made the Estancia grant with the supreme sanction, nevertheless we now suggest that there are grave reasons for supporting our claim, to the extent of eleven square leagues, if it be assumed that the colonization law of 1824, or customs and usages therefrom arising, were operative in New Mexico in 1845. The court has encouraged this assumption by its decisions in *United States vs. Elder*, 177 U. S. 104, 109, 112, and several other cases.

3. A modification, or a remanding for further proofs, would be in furtherance of justice.

In the *Elder* case, 177 U. S., at page 124, Mr. Justice White declared, as to the Cebolla grant, there considered, and the absence of archive evidence: "The tenor of the act of possession forbids the inference that any formal grant was ever executed by the governor," and "The case is therefore without the principle of various decisions of this court where, *with respect to a formal grant*, introduced in evidence, *complying with the requirements of the regulations*, but whose authenticity was disputed, the case was remanded to the lower court to permit the introduction of evidence, if such could be produced, to establish that archive evidence of the grant once existed."

Among the decisions thus alluded to are *United States vs. Galbraith*, 22 How. 89, and *United States vs. Cambuston*, 20 How. 59.

In the case last cited, this court said (p. 68):

> "We should not hesitate to reverse the decree below, and direct a decree against the claimant, were it not that the mode and manner of conducting the case, both before the commissioners and the District Court, on behalf of the Government, may have misled him; for if the objections here stated had been made at the proper time before either of the tribunals, it may have been in his power to have removed them by the introduction of further evidence. It would be unjust, therefore, to deprive him, under the circumstances, of the opportunity to furnish such evidence.
>
> "We shall therefore reverse the decree, and remand the case to the court below for a further hearing."

An equivalent indulgence was granted to the Town of Albuquerque in United States vs. Albuquerque, 171 U. S. 685.

4. The present case is clearly within the "principle" mentioned by Mr. Justice White.

5. The Estancia case was tried in December, 1898, up to which time no New Mexican grant had been criticised by this court or by the Court of Private Land Claims because of the failure of archive proof. On the contrary, it was shown in the very first case tried by the Court of Private Land Claims in New Mexico—the *Cubero* grant, confirmed by that court September 26, 1892, and by this court, on appeal, November 11, 1895 (see *United States vs.*

Chaves, 159 U. S. 452, 460, 462)—that the archives at Santa Fé had been despoiled to a lamentable extent; and, therefore, the absence of archive proof in that case was deemed explained and was treated as unimportant, in view of credible oral proof of a grant once seen in private hands and of possession thereunder. From the date of the trial of the *Cubero* case, September 16, 1892, down to and including the decision of the Estancia by the Court of Private Land Claims, December 20, 1898, and even much later, it was assumed by that tribunal, and even by the Supreme Court on appeal, that genuine original grant papers, such as petition, grant, and act of juridical possession, found in the hands of the claimant, and accompanied with possession, were to be taken as plenary *prima facie* proof of title, even in the absence of duplicate originals or registry notes in the archives.

It is familiar that this court will take judicial notice of public facts, especially when brought to its attention in prior cases. Hence we, like other litigants, were content with perfunctory proof of the mutilated condition of the archives, etc., being confident, from the usual thought and practice of the Court of Private Land Claims, and even of the Supreme Court, in appeals, and especially from the case of United States vs. Chaves, that the rule adopted in the later California cases to avoid the frauds incident to *antedated* California grants had no place in New Mexico, where not one of such frauds had ever been discovered, or even suggested.

The first case in which the Supreme Court ever suggested the application of the peculiar California

"general rule" to New Mexico titles was that of *Hays vs. United States*, 175 U. S. 248, 257, decided December 4, 1899—nearly a year after the trial of the Estancia case, and even that suggestion was made only as a collateral argument in aid of the opinion of the court that the Apache Springs title then considered did not even purport to be a grant by a governor.

The case of *Bergere vs. United States*, 168 U. S. 66, was decided October 18, 1897, and not a word was said in the opinion about any *necessity* for showing archive evidence, but, on the contrary, it was intimated, at page 76, that, if "some explanation as to the possession of [the alleged granting] papers by Baca" had been given, "showing they were intended as in place of the testimonio," the claim might have been more favorably regarded. In that case (pages 78 and 84), the court treated certain subsequent grants (including the Estancia) as having actually been made by the Mexican authorities, and that point was urged by counsel for the government, although their operative validity was not either admitted or denied. This invocation of our title as evidence imports full admission of its *authenticity*.

6. The case of *United States vs. Chaves*, 159 U. S. 452, being extant as controlling authority, on the point of the status of the archives, etc., when the Estancia case was tried, it seems only fair to allow us an opportunity to make further proof on that subject conformably to the theory of the cases since decided which call for a stricter mode of proof.

This would be in accord with settled principles, *e. g.:* Contracts made conformably to the contemporaneous judicial exposition of the relevant law are frequently upheld for that reason, although such contracts would be deemed void if made contemporaneously with other later judicial decisions. Such new rules of decision are analogous to a change in the statutory law, and are not permitted to operate retroactively to the prejudice of litigants.

Douglass vs. Pike County, 101 U. S. 677.

See, also—

101 U. S. 688.

Olcott vs. Fond du Lac Co., 16 Wall. 678.

7. It must be borne in mind that, under the Mexican system, there were several depositaries of "archives." Thus (1) such original instruments or duplicates as the political chief (under the federal system) retained on making a colonization grant, remained at first in his own custody, (2) from the political chief's custody the same identical instruments *(expediente)* would go to the territorial deputation (a legislative body which ceased to exist under the central system), and (3) from the deputation's custody the same identical documents would sometimes go to the *supreme government*, in Mexico.

Again, every magistrate participant in the adjudication of land titles kept his own protocol, the same being a *public archive*.

Many of our citizens and corporations have invested recently large sums of money in land and

mining ventures in old Mexico, and are well aware that the original of every transfer of title appears in the "protocol" or "matrix" kept in public, official custody by the notary (who is an adjudicating and recording officer), and that the private parties interested receive for their "formal title" only duplicates or *testimonios*.

In the grant (of A. D. 1836), cited in the opinion of Mr. Justice Brewer in *United States vs. Pena.*, 175 U. S. 500, at page 503, it was commanded that "the *alcalde* shall take charge of the general document of distribution, *which shall be for the archives*, and he shall give *testimonios* therefrom, as may be requested of him."

Commenting on this, Mr. Justice Brewer says (*Ib.*, page 505):

> "The alcalde is to take charge of this general document for filing in the archives, but *while holding it* he is to give testimonios from it to the several parties who receive grants within the out-boundary limits."

In that case, the act of possession (*Ib.*, page 503) bears date March 25, 1836, yet the prefect, in his order to the alcalde, made as late as March 20, 1848 (*Ib.*, page 507), refers to "all the individuals who are noted down in the grant of said possession, which *ought to be* in the *archive under your charge*."

8. Therefore, an archive is traced to proper, *public* custody when traced into the hands of a lawful *public custodian*.

Now, the original petition and grant in the Es-

tancia case are clearly traced into *public custody;* for we find, from the act of juridical possession, abundantly proved and also *admitted* by the government to be *genuine*, that, upon the very ground, the magistrate, "in *obedience to the decree* of the most excellent governor," proceeded to the land, with his attending witnesses, and then and there "exhibited to him [Aragon, representing the grantee Sandoval] the *petition* the latter had made," etc. It will be remembered that the grant is written on the "petition." (*Transcript*, fol. 78.) The livery of seisin being accomplished, the magistrate then delivers to Sandoval's representative, *not* the grant, but "the present document of possession" (the document which Nolan had recorded. *Transcript*, fol. 74), "that it may serve him as formal title."

It would violate all applicable rules of interpretation to construe this act of juridical possession as importing that the magistrate delivered to Sandoval's representative the archive paper which was then and there merely "exhibited." A legitimate presumption follows that the magistrate put the original petition and grant in the proper place of deposit. In such a case, *Omnia rite esse acta præsumuntur* applies.

Sutter case, 24 How. 170.

9. On more critical examination, we infer that (1) the grant and (2) the act of juridical possession were detached papers, each separately folded and endorsed, and that the only paper recorded by Gervacio Nolan, under the Kearney code, was his copy of

the act of juridical possession, appropriately in his hands. The certificate of the registrar, Donaciano Vigil, is on that paper only. If Gervacio Nolan had had the original petition and grant in his possession, would he not have recorded them with the act of possession?

But the magistrate who had "exhibited" the petition, etc., to the grantee's representative, on the land, during the ceremony of delivering possession, would dutifully deposit such archive papers in a proper depositary.

It was quite the usual practice, in presenting "claims," that is, "notice of claim," to the surveyor general, under the act of 1854, to rely on "archives" already in his hands, and that is probably what was done by Nolan.

NOTE: In the deed from Sandoval to Nolan, July 8, 1848, reference is made to the "*anterior*" grant, "marked letter A," but in the acknowledgement of that deed the deed is referred to as "*antecedente.*" Yet, in making the translation, the translator renders "*anterior*" and "*antecedente*" each by the English word "foregoing;" whereas that translation is misleading. "Foregoing" fairly gives the sense of "*antecedente*," but not of "*anterior*," since "anterior" was used to indicate *priority of time*—in reference to the original grant. The acknowledgment to the deed was a part of that instrument, and on the same paper; but the "*anterior*" grant was not a part of the deed or annexed to it, but a different, separate and distinct paper, probably

then in the archives, there deposited by the proper magistrate or his successor in office.

10. On reading the four opinions filed by the justices of the Court of Private Land Claims, it is evident that no doubt whatever was entertained by a single justice as to the *authenticity* of the Estancia title papers, or as to the good faith of the claimants, but that the only question considered or debated was that of the *authority* exercised by Governor Armijo in creating the title. The claimants invoked the authority of the Supreme Executive, who, by the law of April 4, 1837, had been clothed with general administrative power over the public domain, and they contended that, in view of all the circumstances, it should be held that Armijo acted in the matter under presumed executive sanction. This was the only serious ground of contention on the trial, although, technically and theoretically, all possible questions were relevant under the perfunctory pleadings and objections of the government, and, indeed, under the literal import of the statute establishing the court. Mr. Justice Murray, in his opinion, seemed to yield assent to our claim that, *if the Supreme Executive was competent to make our grant*, it was reasonable to presume that Armijo acted with the supreme approval; but Mr. Justice Murray denied the right of even the Supreme Executive to make such a grant. Mr. Justice Stone sustained the grant, because he believed that the Supreme Executive could make it, and also that Armijo must be presumed to have acted with the supreme sanction.

The other three justices, all believing that the regulations of 1828 were in force, but only two of them believing that the law of 1824 was also in force, appear to have thought it was more justifiable to assume the grant to be subject to the eleven square leagues limitation of the old colonization system than to assume it to be an exercise of the wide discretionary power of the Supreme Executive, existing outside the restrictions of that system. Therefore these three justices—Mr. Chief Justice, Mr. Justice Sluss and Mr. Justice Fuller—put their decision on the ground that the confirmation of the Bosque del Apache claim for upwards of eleven square leagues displaced Nolan's right to secure the Estancia, or any part of it. (*Transcript*, fols. 171, 172.)

The Bosque del Apache was the only obstacle, and they apparently did not regard the mere extent of the Estancia as any obstacle to allowing eleven square leagues.

In the opinion written by Mr. Justice Peckham, in this case, the court regarded our title from alternative views; that is, first, on the assumption that our title depends on the old federal law, and, secondly, on the alternative assumption that it depends on an alleged supreme executive authority. The ruling of the court is positive that, under the restricted jurisdiction conferred on the Court of Private Land Claims, the action of Armijo cannot be aided by a favorable presumption. To that ruling we are respectfully submissive.

But we feel that, in equity and good conscience, it is still within the power of the court, by a modifi-

cation of its decree, to permit us to retain eleven square leagues of the estate we have held so long, and thus save at least a part of our large investment for purchase and improvements. (See annexed affidavit of J. Parker Whitney.)

11. The prohibition of the colonization law of 1824, as to the extent of land acquisitions under that law, was that not more than eleven square leagues of land could be united "*como propiedad*," that is, *as property in fee*, in the hands of one person (see Mr. Justice Brown's definition of "*propiedad*," etc., in the Zia case, 165 U. S. 198); but that prohibition concerned only the government and the grantee, and could not be invoked by a third party, except by judicial denouncement. The *possession* of a larger area under one grant was not unlawful or void, but such *possession* could be asserted as property—"*como propiedad*"—only to the extent of eleven square leagues. Hon. Eduardo Ruiz, in his opinion, shows the distinction in Mexican law between *possession* and *property*. A grant under the colonization law of an area exceeding eleven square leagues was, by the law of Mexico, not a mere nullity, but it was a thing of high and legal merit and significance. It was a legal possession *voidable for the excess only*. Orozco (mentioned by this court in *United States vs. Santa Fé*, 165 U. S. at page 710) says, in his *Legislacion y Jurisprudencia sobre Terrenos Baldios*, at page 202:

> "It might not be idle to inquire whether a title would be valid if issued in contravention of the provisions of Article 12 of

the law, while it was in force, so as to put in the power of one individual more than the eleven square leagues permitted.

"It appears most rational to affirm that, being prohibitive, every adjudication which *exceeds* the agrarian quantity permitted by that law ought to be considered null, and, in that case, *the land which forms such excess* will have remained legally under the dominion of the nation and may be solicited as property by a third person, especially if there was fraud or bad faith on the part of the one who acquired a greater quantity of land than the law permits. All this without prejudice to the allegations that may be made for immunity under the prescription *longi temporis*, should there concur the requisites established by common law for acquiring real property by means of adquisitive prescription."

And this is the view taken by our Congress in the restriction of confirmations to eleven square leagues to each grantee, not only by special confirmatory acts, but even by the act of 1891, establishing the Court of Private Land Claims.

It was the view, declaratory of the common understanding in Mexico, taken by the legislature of Sonora when, in the decree of May 14, 1835, cited in *Ainsa vs. United States*, 161 U. S. 208, at page 226, it declared:

"Those are likewise '*bona fide*' owners who, under the descriptions given in their records of survey, occupy some excess of land, and they are entitled to such excess,

> even after such excess is shown, without any other requirement than that of paying for the excess in accordance with the quality of land and the price which prevailed when the land was measured and appraised," etc.

Even when a grant of quantity, *e. g.*, eleven square leagues, was made to be segregated out of a vastly greater area, and the grantee, before segregation, received possession of the whole of the larger area, his possession was deemed a legal possession of the whole under which he could maintain ejectment in the American tribunals, for any part of the land.

Van Reynegan vs. Boynton, 95 U. S. 33.

12. Now, what was the equitable standing of the Estancia, after its conveyance by Sandoval to Nolan in 1848, in its relation to the Bosque del Apache?

The Bosque del Apache, although dated November 24, 1845, did not vest in legal possession until delivery of juridical possession, March 7, 1846.

Mr. Justice Brewer said, in *United State vs. Pena*, 175 U. S. 500, at page 506:

> "We think it more in consonance with justice and equity to hold, not that the grant was of an entire tract which *never became operative* because of a *failure to give juridical possession*, but that the alcalde rightfully understood it as a grant in severalty, and *giving juridical possession* vested in the grantees the tracts of which they were so placed in possession."

But the Estancia, although dated December 7, 1845, became vested in legal possession long before the Bosque del Apache, for the Estancia was delivered in juridical possession December 15, 1845. Under the colonization law of 1824, was it right for Sandoval, after receiving possession of the Estancia December 15, 1845, to acquire possession of the Bosque del Apache March 7, 1846? Was not his conduct, in accepting possession of the Estancia, December 15, 1845, an *election* to prefer that title to the inchoate equity in the Bosque del Apache? Then came the solemn deed of July 8, 1848, by the very terms of which Sandoval stipulated that neither he nor his heirs would ever interpose any impediment to the Estancia title. Then came the *lis mota*, indicated by the filing by Nolan, in the political department, of his claim to the Estancia, July 15, 1855, years before any claim was set up to the Bosque del Apache. Here was notice to our government of Nolan's prior equity. In spite of the deed of 1848, the *lis mota* of 1855, and the consequent notice to our government of the Nolan equity, was it competent for either the government or Sandoval, by confirmation *ex parte* of the *Bosque del Apache*, under a claim first set up in 1859, to destroy the *Estancia* title?

13. The legal standing of a grant made by a departmental governor, accompanied with possession, especially when such possession has the dignity and ceremonious solemnity attached to a formal juridical act, has been often recognized and declared by this court.

In *Hornsby vs. United States*, 10 Wall. 224, no regard was paid to the historical fact that "territorial deputations" were abolished by the destruction of all territories and states and their conversion into uniform, co-equal departments; but it was assumed that, first, the departmental "*juntas*" and, second, the succeeding "departmental assemblies" were the equivalents of the old territorial deputations, thus leaving it in doubt what the situation was in the departments which were formerly *States*.

But the court said (syllabus):

> "According to the regulations of 1828, the authority to make grants of land in California was lodged solely with the governor. It was not shared by him with the assembly. That body only possessed the power to approve or disapprove of grants made by him. Until such approval the estate granted was subject to be defeated. * * *
>
> "In passing upon claims made under Mexican grants in California, the question is, what *right* did the grantees acquire in the land from the Mexican authorities? This court cannot inquire into any acts or omissions by *them* since those authorities were displaced. It is not authorized to pronounce a forfeiture for anything done or anything omitted by *them* since that period. * * *
>
> * * * "The interest which passed by the grant in this case, whether it be regarded as a legal title, imperfect in its character, and to be perfected by a subsequent official survey and segregation of the quantity designated, or as a mere equitable or inchoate interest, *constituted property* which

> the United States were *bound to protect* by the *stipulations of the treaty of cession*. By the term property, as applied to lands, all *titles* are embraced, legal or equitable, perfect or imperfect."

Of course, all "titles" are held by "right," and not by mere "grace."

SECTION 6 of "An act to establish a court of private land claims and to provide for the *settlement* of private land claims in certain States and Territories," approved March 3, 1891, contemplates that all imperfect claims of any legal standing whatever come under the jurisdiction of the land court, when the claims exist by virtue of such "grant," "concession," or even mere "warrant" or "survey," "as the United States *are bound to recognize* and confirm by virtue of the treaties of cession."

And the court is "authorized and *required* to take and exercise jurisdiction of *all* cases or *claims* presented by petition in conformity with the provisions of this act."

Again:

> "Sec. 12. That all claims mentioned in section six of this act which are by the provisions of this act authorized to be prosecuted shall, at the end of two years from the taking effect of this act, if no petition in respect to the same shall have then been filed as hereinbefore provided be deemed and taken, in all courts and elsewhere, to be *abandoned*, and shall be *forever barred*."

The Estancia has been *sub judice* nearly fifty

years, the whole tract sacredly reserved from sale by the act of 1854, and, in addition to our large purchase money, we have expended upwards of $30,000 in improvements—buildings, wells, windmills and fences. Unless relieved now, under the equitable powers of the court, the land, after the issue of your mandate, will be treated as public domain, and strangers will appropriate our improvements, at little or no cost, under the general land laws, and, excluding us, will gain the fruits of our money and labor, and, besides, enjoy the outlying pastures as *untaxed*, unwatered and waste public lands. We cannot even hope for congressional relief in time to prevent the schemes of avaricious strangers.

The act of 1891 was intended for the just "settlement" of private land claims, in faithful observance of the treaty of 1848.

Respectfully submitted.

JNO. H. KNAEBEL,
ERNEST KNAEBEL,
of Counsel for Appellants.

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Appeal from the Court of Private Land Claims.

STATE OF COLORADO, }
County of Pueblo. } ss.

I, the undersigned, Joel Parker Whitney, of

Boston, in the Commonwealth of Massachusetts, now temporarily sojourning in the city of Denver, Colorado, being duly sworn, depose and say as follows:

I am one of the appellants in the above entitled appeal. I purchased the Antonio Sandoval or Estancia Grant, situate in the county of Valencia, Territory of New Mexico, from the heirs and legal representatives of the late Gervacio Nolan, by deed dated the 23rd day of September, A. D. 1880, and afterwards conveyed one undivided half thereof to the above named Franklin H. Story by deed dated the 6th day of November, A. D. 1880; both of which deeds were recorded in the office of the Probate Clerk of Valencia county aforesaid, in Book "A" No. 4, pages 485-489, and 498-500. The said property was purchased in good faith by myself and Mr. Story, and actual possession of the entire tract was received by us from the said Nolan heirs and representatives, except one spring which was occupied by a squatter named McAfee, who was subsequently dispossessed in legal proceedings, another spring which had once been squatted upon and had afterwards been taken possession by some claimant or claimants under the alleged Bartolome Baca Grant. Mr. Story and I caused about ninety miles of fence to be erected upon the property soon after the said purchase, and also numerous buildings, corrals and other enclosures, and also caused wells to be sunk upon the property and windmills to be there established, and we conducted for years after our purchase a very large cattle ranch upon the premises. The expense of the improvements made under our title exceeded

the sum of thirty-four thousand dollars, and the taxes paid in the same right exceeded three thousand dollars.

J. PARKER WHITNEY.

Subscribed and sworn to before me this 9th day of February, 1901.

THOMAS J. DOWNEN,
Notary Public in and for Pueblo County.

{ NOTARIAL SEAL }

My commission expires Nov. 16th, 1893.